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8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**  
10

11 PETITION TO AMEND THE  
12 ARIZONA RULES OF CIVIL  
13 PROCEDURE TO ABROGATE  
14 RULE 13(f) AND AMEND  
15 RULE 15(a)(1)

Supreme Court No. R-\_\_\_\_\_

**Petition to Amend Arizona  
Rules of Civil Procedure to  
Abrogate Rule 13(f) and  
Amend Rule 15(a)(1)**

16 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar  
17 of Arizona hereby petitions this Court to abrogate Rule 13(f) and amend  
18 Rule 15(a)(1) of the Arizona Rules of Civil Procedure. These proposed  
19 amendments are intended to modify current rules to incorporate, with a few  
20 modifications, recent amendments to Rules 13(f) and 15(a)(1) of the Federal Rules  
21 of Civil Procedure:

22 (a) Current Arizona Rule 13(f), which governs amendment of a pleading to  
23 add an omitted counterclaim, is similar to former Federal Rule 13(f), which was  
24 abrogated in December 2009. As with former Federal Rule 13(f), Arizona  
25 Rule 13(f) should be eliminated because Rule 15(a) already authorizes courts to  
26 allow amendments to pleadings. Its existence also inadvertently suggests that a  
proposed amendment to add a counterclaim should be treated differently from other  
types of proposed amendments governed by Rule 15(a).

1 (b) Like the recent amendments to Federal Rule 15(a)(1), the proposed  
2 amendments to Arizona's Rule 15(a)(1) would permit amendment of a pleading as  
3 a matter of course within a fixed time period after the filing of the pleading or the  
4 service of certain types of Rule 12 motions. The State Bar, however, proposes  
5 certain modifications to the federal rule changes to adapt them to Arizona state  
6 court practice.

7 Attached as Appendix A are redlined versions of the proposed amendments  
8 to Rules 13(f) and 15(a).

9 **Rationale Supporting Proposed Abrogation of Rule 13(f)**

10 In December 2009, Federal Rule 13(f), governing amendments to assert  
11 omitted counterclaims, was abrogated. The advisory committee's note  
12 accompanying the amendment explained that the rule was "largely redundant and  
13 potentially misleading," as Federal Rule 15(a) already governs amendments to  
14 pleadings, including amendments to add omitted counterclaims. *See* Fed. R. Civ.  
15 P. 13(f), advisory committee's note (2009 Amendments). It also noted that,  
16 although Rule 13(f) seemed to set forth different standards for allowing an  
17 amendment than those under Rule 15(a), in practice, courts appeared to be  
18 following ("as they should be") Rule 15(a)'s general standard "directing that leave  
19 to amend should be freely given when justice so requires." Finally, the independent  
20 existence of Rule 13(f) created uncertainty as to whether relation back of an  
21 amendment was available under the rule. *Id.* Abrogating Rule 13(f) ensured that  
22 all pleading amendments, including those adding counterclaims, would be governed  
23 by Rule 15(a)'s standards and that the case law developed under Rule 15(c) would  
24 apply to whether an amendment asserting an omitted counterclaim relates back. *Id.*  
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1        These same considerations favor eliminating Arizona Rule 13(f). While  
2 Arizona Rule 13(f) is worded somewhat differently than the now-abrogated Federal  
3 Rule 13(f), the former permits, and the latter permitted, a court to allow the  
4 assertion of an omitted counterclaim if the omission was the result of “oversight,  
5 inadvertence, or excusable neglect,” or when required by justice. *Compare*  
6 Arizona’s Rule 13(f) *with* former Federal Rule 13(f). Given that Arizona’s  
7 Rule 15(a) governs any amendments to a pleading (including the addition of an  
8 omitted counterclaim), no sound policy reason exists to support the continued  
9 independent existence of Rule 13(f). Eliminating the rule also would preempt an  
10 argument that an amendment to add a counterclaim should be treated differently  
11 than other types of amendments. Further, abrogating Rule 13(f) would remove any  
12 existing doubt as to whether an amendment to assert an omitted counterclaim is  
13 subject to the “relation back” standards set forth in Rule 15(c).

14                    **Rationale Supporting Proposed Amendment of Rule 15(a)(1)**

15        Also in December 2009, Federal Rule 15(a)(1) was substantially amended.  
16 Under the prior rule, the filing of a responsive pleading (*i.e.*, an answer) terminated  
17 the right to amend as a matter of course. But because a Rule 12 motion is not a  
18 “pleading” under Rule 7(a), a pleader remained free to amend his or her pleading as  
19 a matter of course even if such a motion was filed. A pleader could thus amend as a  
20 matter of course in an attempt to overcome certain Rule 12 motions attacking the  
21 pleading, but not in reaction to defenses or pleading errors raised in a responsive  
22 pleading.  
23

24        Under the amended federal rule, the right to amend as a matter of course may  
25 be exercised up to twenty-one days following service of a responsive pleading or a  
26 motion attacking the pleading under Rule 12(b), (e), or (f), whichever is earlier. A

1 pleader is thus forced “to consider carefully and promptly the wisdom of amending  
2 to meet the arguments in the motion” or to cure pleading defects raised in a  
3 responsive pleading. *See* Fed. R. Civ. P. 15(a)(1), advisory committee’s note (2009  
4 Amendments). Also, because many federal courts no longer employ trial calendars,  
5 Federal Rule 15(a)(1) was amended to delete a provision that terminated the right to  
6 amend as a matter of course if the case had been placed on the trial calendar. *Id.*

7 For the reasons given in the advisory committee note, the State Bar is  
8 persuaded that Arizona Rule 15(a)(1) should be amended to incorporate most of the  
9 changes in Federal Rule 15(a)(1), with several modifications to adapt the federal  
10 amendments to Arizona state court practice. Specifically, the State Bar proposes  
11 that Rule 15(a)(1) be amended: (1) like the federal rule amendments, to permit  
12 amendment as a matter of course up to twenty-one days following service of a  
13 responsive pleading; (2) like the federal rule amendments, to alter the deadline for  
14 amendment as a matter of course after filing a pleading to which no responsive  
15 pleading is permitted from twenty days to twenty-one days; and (3) similar but not  
16 identical to the federal rule amendments, to expressly permit amendment as a  
17 matter of course through and including the date upon which any response must be  
18 filed in opposition to a motion under Rule 12(b), (e), or (f).

19 The State Bar’s proposed amendments differ from the federal rule  
20 amendments in the following respects:

21 First, under the State Bar’s proposed amendments, a pleader could amend as  
22 a matter of course through the date upon which a response must be filed in  
23 opposition to a motion brought under Rule 12(b), (e), or (f). One of the policy  
24 objectives to be served by the proposed amendment is to avoid needless motion  
25 practice by encouraging a pleader to promptly amend his or her pleading to address  
26

1 correctable pleading deficiencies that are raised in certain Rule 12 motions. The  
2 State Bar believes that this objective would be best served if the rule requires the  
3 pleader to exercise the right to amend on or before the date upon which a response  
4 to the motion is required, as opposed to expiration of the twenty-one day period  
5 specified in Federal Rule 15(a)(1). Because Rule 7.1(a) calls for a response to be  
6 filed within ten days after service of a Rule 12 motion, adoption of a twenty-one  
7 day time period would likely result in a response to the motion being due before the  
8 deadline for amending the pleading, partially frustrating the rationale supporting the  
9 proposed amendment to Rule 15(a)(1). Additionally, express reference to the  
10 presumptive deadline for responding to a Rule 12 motion (*i.e.*, ten days after service  
11 of the motion) was not included because, in practice, parties frequently extend  
12 response deadlines through agreement and notice to the court.<sup>1</sup>

13  
14 Second, the State Bar recommends amending Rule 15(a)(1) to provide that  
15 the filing of an amended complaint does not automatically moot a pending Rule 12  
16 motion. Ideally, an amended complaint would resolve the issues raised in a motion  
17 regarding the adequacy of the pleading's allegations. But that is frequently not the  
18 case. For example, a pleader may concede the merits of a Rule 12 motion with  
19 respect to some, but not all, of the alleged deficiencies identified in the motion, and  
20 choose to limit its amendments accordingly. Similarly, while the pleader may  
21 believe that the amendments cure the defects identified in the motion, the movant  
22 may disagree.

23  
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25 <sup>1</sup> To the extent an amending party desires extension of the time within which to respond to  
26 a motion or the court is inclined to grant such relief on its own initiative, Rule 6(a)  
provides both the necessary procedural mechanisms and the authority for enlargement of  
the response time.

1       The issue is what to do in such a situation. As an amended pleading  
2 supersedes the prior pleading, filing an amended complaint arguably renders a  
3 Rule 12 motion moot, requiring the movant to file yet another motion attacking the  
4 adequacy of the allegations set forth in the amended complaint. In the State Bar's  
5 view, it would result in less delay, and be less costly for the parties, to resolve any  
6 remaining issues in the same round of briefing rather than require the movant to file  
7 another motion. The proposed rule amendment would do that by providing that the  
8 filing of an amended complaint "does not, by itself, moot the motion as to the  
9 adequacy of the allegations of the pleading as revised in the amended pleading and  
10 does not relieve" the pleader from timely responding to the motion.

11       The following illustrates how this rule amendment would work in practice.  
12 If a pleader believes that the defects identified in a Rule 12 motion can be cured by  
13 amendment and wants to avoid the time and expense of preparing a response to the  
14 motion, he or she could send a draft of the amended pleading to the movant in  
15 advance of the response date to confirm that the amendments address the movant's  
16 concerns. If they do, the pleader would file the amended complaint and the movant  
17 would withdraw the motion, ending the matter. If they do not, the briefing on the  
18 motion would continue based on the revised allegations set forth in the amended  
19 complaint. The pleader would file the amended complaint and a response  
20 explaining why the amendments cure some or all of the asserted pleading defects,  
21 and the movant would explain in its reply brief why it believes that the amended  
22 pleading is still deficient. The court would then resolve the remaining disputes  
23 about the adequacy of the amended complaint's allegations.  
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25       Third, the State Bar recommends using the phrase "no later than" to describe  
26 the periods during which amendment may be made as a matter of course rather than

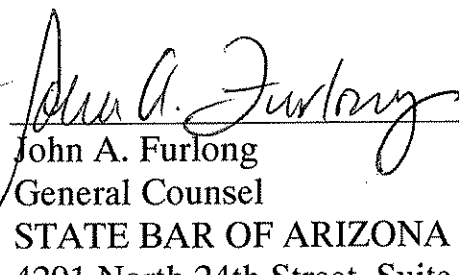
1 the word "within," which appears in Federal Rule 15(a)(1). While the advisory  
2 committee's note accompanying the federal amendment does not suggest any intent  
3 to preclude a party from amending a pleading before serving it, the use of the word  
4 "within" in Federal Rule 15(a)(1) might lead to such an interpretation. To eliminate  
5 this ambiguity and explicitly authorize amendment as a matter of course before  
6 serving an affected pleading (which is allowed under Arizona's current  
7 Rule 15(a)(1)), the proposed amendment to Rule 15(a)(1) uses the phrase "no later  
8 than" instead of "within" in each of subsections (A) and (B).

9 In sum, the proposed amendments to Rule 15(a)(1) would (1) give parties an  
10 incentive and opportunity to promptly correct defects in their respective pleadings  
11 without having to involve the courts; and (2) provide a procedural mechanism to  
12 resolve remaining disputes over the adequacy of a complaint's allegations in one  
13 round of briefing. As this is likely to save litigation costs and enhance judicial  
14 efficiency, the State Bar recommends the amendments' adoption.

### 15 Conclusion

16 The State Bar of Arizona respectfully requests that the Court amend the  
17 Arizona Rules of Civil Procedure to abrogate Rule 13(f) and amend Rule 15(a)(1)  
18 as shown in Appendix A.  
19

20 RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of January, 2011.

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1 Electronic copy filed with the  
2 Clerk of the Supreme Court of Arizona  
3 this 5<sup>th</sup> day of January, 2011  
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5 By: Kathleen A. Lundgren  
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## **APPENDIX A**

## **Proposed Rule Changes**

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).*

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### **Rule 13(f). ~~Omitted Counterclaim~~**

~~When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment~~[Abrogated].

## Proposed Rule Changes

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by "~~strike-through~~").*

### Rule 15(a). Amendments

1. A party may amend the party's pleading once as a matter of course:

A. no later than twenty-one days after serving it if the pleading is one to which no responsive pleading is permitted; or

B. no later than twenty-one days after service of a responsive pleading if the pleading is one to which a responsive pleading is required or, if a motion under Rule 12(b), (e), or (f) is served, on or before the date on which a response to the motion is due, whichever is earlier.

~~at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party. Leave to amend shall be freely given when justice requires. Amendment as a matter of course after service of a motion under Rule 12(b), (e), or (f) does not, by itself, moot the motion as to the adequacy of the allegations of the pleading as revised in the amended pleading and does not relieve a party opposing the motion from filing a timely response to the motion.~~

2. A party who moves for leave to amend a pleading must attach a copy of the proposed amended pleading as an exhibit to the motion, which shall indicate in what respect it differed from the pleading that it amends, by bracketing or striking through the text to be deleted and underlining the text to be added. If a motion for

**Proposed Rule Changes**

*(Petitioner's proposed changes shown with additions identified by underscoring and deletions identified by ~~"strike-through"~~).*

leave to amend is granted, the moving party shall file and serve the amended pleading within ten days of the order granting the motion, unless the court otherwise orders.

3. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.